RECORD AND BRIEFS

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No. 14-562

# In the Supreme Court of the United States

VALERIA TANCO, ET AL., PETITIONERS

*v.*

WILLIAM EDWARD "BILL" HASLAM, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## REPLY BRIEF OF PETITIONERS

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## REPLY BRIEF OF PETITIONERS

Respondents acknowledge (Br. in Opp. 10) that the court of appeals' ruling created a direct conflict with four other circuits on the question whether a state may exclude same-sex couples from the fundamental right to marry or refuse to recognize those couples' valid out-of-state marriages. Respondents nonetheless urge the Court to deny the petition. Apart from noting that the Court is not "compelled" to grant review of a circuit split (Br. in Opp. 11), respondents offer no reason why the Court should not now take up the issue. Petitioners are suffering immediate and serious injury as a result of Tennessee's refusal to recognize their lawful marriages. Thousands of other couples in the Sixth Circuit are likewise now denied a fundamental right enjoyed by their fellow citizens in 35 states and the District of Columbia. This Court should grant a writ of certiorari to

resolve the circuit conflict on this question of exceptional importance.

## I. THIS COURT SHOULD RESOLVE THE CIRCUIT CONFLICT ON THE IMPORTANT ISSUE PRESENTED

The conflict among the courts of appeals warrants this Court's review. The initial uniformity among the district and appellate court opinions that addressed the marriage equality issue post-*Windsor* raised the prospect that there might never be a conflict for this Court to resolve. But the decision of the court of appeals in this case eliminated that possibility. By declaring itself bound by the one-line dismissal in *Baker* v. *Nelson*, 409 U.S. 810 (1972), the court of appeals made clear that only a ruling by this Court can resolve the disagreement among the circuits and vindicate petitioners' rights.

Although this Court is not "compelled" to grant certiorari when a circuit split exists (Br. in Opp. 11), review is plainly warranted where, as here, the conflict is genuine, the question and arguments have received adequate attention and full development in the courts of appeals, and the issue is important and has widespread and ongoing significance.

Respondents argue that the ongoing conflict is tolerable because differences in state marriage law are a feature of federalism. Br. in Opp. 6-8. But that argument assumes that the Court would resolve the questions presented here in respondents' favor. This Court in *Windsor* emphasized that "[t]he States' interest in defining and regulating the marital relation [is] subject to constitutional guarantees." *United States* v. *Windsor*, 133 S. Ct. 2675, 2692 (2013). Petitioners contend, and several courts of appeals have held, that *no* state

may constitutionally exclude same-sex couples from the right to marry. Principles of federalism do not justify a state's denial of equal protection or fundamental constitutional rights such as the freedom to marry and the right to travel. Rather, petitioners' constitutional claim that Tennessee may not refuse to recognize their valid marriages entered into out of state furthers interests that are vital to our federal system. Tennessee's argument would make it impossible for married same-sex couples such as petitioners to travel safely throughout this country without risking the essential dissolution of their family ties as they cross state lines. The Constitution does not permit such an unstable and untenable disparity to persist where fundamental liberty interests are at stake.

Petitioners are suffering immediate and substantial injuries as a result of the court of appeals' decision. Tennessee's Non-Recognition Laws relegate petitioners and their children to second-class status. By refusing to recognize petitioners' marriages, Tennessee deprives them of the dignity and respect conferred by marriage and of the numerous state and federal benefits that other married couples and their families enjoy. See Pet. Br. 4-6. And petitioners are not alone. Other same-sex couples and their families face similar obstacles and harms daily, as described in the brief of *amici curiae* COLAGE, Equality Federation, Family Equality Council, Freedom to Marry and PFLAG. See COLAGE et al. Amicus Br., *DeBoer* v. *Snyder*, No. 14-571 (Dec. 15, 2014). As *amici* explain, the harms stemming from the Non-Recognition Laws are both tangible and dignitary. *Id.* at 7. Tangible harms include denial of a host of state and federal benefits available to married opposite-sex couples, such as access to family health in-

surance, spousal Social Security benefits, visitation and decision-making rights during medical emergencies, duties of financial support, and inheritance rights, among others. *Id.* at 9-17. Moreover, by singling out marriages of same-sex couples as unworthy of recognition, the State humiliates those couples and their children to the detriment of their emotional well-being and sense of family stability. *Id.* at 18-22. These severe and ongoing harms provide further reason for the Court to review the court of appeals' decision.

## II. THE DECISION OF THE COURT OF APPEALS IS AT ODDS WITH THIS COURT'S PRECEDENT

Respondents' attempts to reconcile the court of appeals' decision with this Court's precedent ignore the principles on which this Court's decisions rest. Respondents contend, for example, that this Court has recognized a right to marry only within the "traditional" concept of marriage. Br. in Opp. 8. But at the time this Court decided *Loving* v. *Virginia*, 388 U.S. 1 (1967), the "traditional" definition of marriage in some states was an institution restricted to two persons of the same race. *Id.* at 6 (noting that laws against miscegenation had "been common in Virginia since the colonial period"); see *Lawrence* v. *Texas*, 539 U.S. 558, 577-578 (2003) ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (internal quotation marks omitted). While respondents urge this Court, like the court of appeals, to adopt a "wait and see" attitude "before changing a norm" that has long restricted individuals' right to marry, Pet. App. 34a, *Loving* rejected similar calls to defer to tradition and to allow the political process to resolve the question presented notwithstanding the fundamental constitutional liberties at issue. See 388

U.S. at 6 & n.5. Had the Court adopted such deference, interracial couples in Tennessee would have waited at least a decade, if not much longer, for their marriages to be recognized. Notwithstanding the decision in *Loving*, it was eleven more years before Tennessee repealed the anti-miscegenation provision in the State's constitution, and even then Tennessee voters did so only by a vote of 199,742 to 191,745. See *Jim Crow Stalks South*, Wilmington Morning Star, July 13, 1978, at 13-C. Here, as in *Loving*, calls for deference to tradition or to the political process cannot justify the ongoing harm to petitioners and thousands of other same-sex couples caused by the deprivation of basic due process and equal protection guarantees in Tennessee and the 14 other states where marriages between same-sex couples remain unrecognized.

Respondents' reliance on *Baker* v. *Nelson*, 409 U.S. 810 (1972), for the proposition that *Loving* was based on a concept of marriage rooted in procreation is misplaced. Br. in Opp. 9. *Baker* was decided many years before the Court made clear in *Turner* v. *Safley*, 482 U.S. 78 (1987), that states may not deny the fundamental right to marry to couples simply because they cannot procreate. *Turner* held that the fundamental right to marry derives from the fact that marriage may involve, among other things, deeply personal "expressions of emotional support and public commitment," the "exercise of religious faith," the "expression of personal dedication," and access to legal benefits, all of which "are an important and significant aspect of the marital relationship." *Id.* at 95-96.

Finally, respondents' efforts to treat *Lawrence*, 539 U.S. 558, and *Romer* v. *Evans*, 517 U.S. 620 (1996), as irrelevant to the issues this case presents, see Br. in

Opp. 9-10, ignore the central role those cases played in this Court's analysis in *United States* v. *Windsor*. See, *e.g.*, 133 S. Ct. 2675, 2694 (2013) (citing *Lawrence* for the proposition that "the Constitution protects" the "moral and sexual choices" of married same-sex couples who are "demean[ed]" by being placed "in an unstable position of being in a second-tier marriage"); *id.* at 2692 (quoting *Romer* in explaining that unusual forms of discrimination require particularly "'careful consideration'"). The courts of appeals that have recently held invalid state measures excluding same-sex couples from marriage have correctly concluded that the principles explained in *Romer* and *Lawrence* provide powerful support for the proposition that the constitutional right to marry includes same-sex couples.

Respondents attempt to minimize the discriminatory nature of the Non-Recognition Laws by suggesting that Tennessee's anti-recognition statute is one of general applicability, but that argument ignores the law's text and applicable case law. According to respondents, Tennessee Code Section 36-3-113(d) applies broadly to prohibit recognition of *any* out-of-state marriage that could not have been performed in Tennessee, not just marriages of same-sex couples. Br. in Opp. 9-10 n.5. Respondents' suggestion is contradicted by the language of Section 36-3-113(d) itself and by many Tennessee appellate state court decisions, which have continued to recognize out-of-state marriages of opposite-sex couples following the enactment of Section 36-3-113(d), provided the marriages were validly entered into under the laws of another state.

Section 36-3-113(d)'s caption expressly stated that it was "AN ACT To amend Tennessee Code Annotated, Title 36, Chapter 3, *relative to same sex marriages* and

the enforceability of such marriage contracts." 1996 Tenn. Pub. Acts 1031 (emphasis added). Under article II, section 17 of the Tennessee Constitution, the subject of a legislative act must be accurately expressed in its caption. See *Tenn. Mun. League* v. *Thompson*, 958 S.W.2d 333, 338 (Tenn. 1997). Not surprisingly, then, since the enactment of Section 36-3-113(d), Tennessee appellate courts have continued to recognize as a matter of course out-of-state marriages of opposite-sex couples that could not have been entered into in Tennessee. See, *e.g.*, *Lindsley* v. *Lindsley*, No. E2011-00199-COA-R3-CV, 2012 WL 605548, at *1 (Tenn. Ct. App. Feb. 27, 2012) (common-law marriage under Texas law); *Farnham* v. *Farnham*, 323 S.W.3d 129, 140 (Tenn. Ct. App. 2009) (marriage based on the doctrine of marriage by estoppel under the laws of Florida and Massachusetts); *Ochalek* v. *Richmond*, No. M2007-01628-COA-R3-CV, 2008 WL 2600692, at *6 n.9 (Tenn. Ct. App. Jan. 30, 2008) (common-law marriage under Kentucky law); *Bowser* v. *Bowser*, No. M2001-01215-COA-R3CV, 2003 WL 1542148, at *1 (Tenn. Ct. App. March 26, 2003) (common-law marriage under Ohio law); *Stoner* v. *Stoner*, No. W2000-01230-COA-R3-CV, 2001 WL 43211, at *3 (Tenn. Ct. App. Jan. 18, 2001) (common-law marriage under Maryland law); *Payne* v. *Payne*, No. 03A01-9903-CH-00094, 1999 WL 1212435, at *4 (Tenn. Ct. App. Dec. 17, 1999) (common-law marriage under Georgia law). In any event, respondents do not contest that the challenged *constitutional amendment* is directed exclusively at the non-recognition of marriages between same-sex couples. Tennessee's Non-Recognition Laws thus deny recognition only of out-of-state marriages between persons of the same sex.

## III. This Case Presents An Appropriate Vehicle For Review

This case provides an appropriate vehicle for the Court to resolve the critical constitutional questions at issue. Because petitioners challenge the Non-Recognition Laws as violating their constitutional right to travel—in addition to presenting equal protection and due process challenges to the laws—this case presents for review the full panoply of constitutional arguments regarding recognition of the marriages of same-sex couples. Petitioners' own circumstances—losing recognition of their marriages after moving to Tennessee for employment—bring into stark relief the ways in which a state's refusal to recognize the valid out-of-state marriages of same-sex couples defeat the "virtually unconditional personal right, guaranteed by the Constitution to us all" to "be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement." *Saenz* v. *Roe*, 526 U.S. 489, 498, 499 (1999) (internal quotation marks omitted). For same-sex couples, the prospect that their marriage will be deemed null and void if they take a job, or even plan a vacation, in another state severely burdens such couples' ability to travel freely throughout our Nation.[1]

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[1] Respondents' sole and half-hearted suggestion that this case "to some degree" might be an inappropriate vehicle for the Court to resolve the circuit conflict occurs in a footnote noting that respondents asserted a statute-of-limitations defense that the district court rejected in granting petitioners' request for a preliminary injunction and stating that "[t]his case is in an interlocutory posture." Br. in Opp. 3 n.2 (declining to describe respondents' purported defense). But there is nothing interlocutory about the

The absence of a circuit conflict on the right to travel question in this context does not counsel against granting review, as respondents contend. Br. in Opp. 10 n.7. Because the right to travel is of central importance to our federal system of government, this Court previously has granted review regarding the right to travel despite the lack of a circuit conflict. *E.g.*, *Saenz*, 526 U.S. at 498 ("Although the decision of the Court of Appeals is consistent with the views of other federal courts that have addressed the issue, we granted certiorari because of the importance of the case.").

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[2]

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decision of the court of appeals, which fully resolved petitioners' constitutional claims on the merits. Respondents do not dispute that this Court has granted certiorari in other cases in which a court of appeals reversed a preliminary injunction on the basis of purely legal ruling, as is the case here. See Pet. Br. 36 (citing *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986); *Cmty Commc'ns Co.* v. *Boulder*, 455 U.S. 40, 47-48 (1982)). Accordingly, nothing about the posture of this case makes it an inappropriate vehicle to resolve the questions presented.

[2] This Court should not hold this case pending a possible petition for a writ of certiorari that might be filed in *Latta* v. *Otter*, 771 F.3d 456 (9th Cir. 2014), petition for rehearing (filed Oct. 21, 2014), as suggested by *amicus curiae* Idaho Governor C.L. "Butch" Otter. See Otter Amicus Br., *Tanco* v. *Haslam*, No. 14-562 (Dec. 15, 2014). This case presents an appropriate vehicle for resolving the exceptionally important questions presented, and any delay will unduly prolong the harm to petitioners and the deprivation of fundamental constitutional liberties. The Tennessee respondents have vigorously defended the State's Non-Recognition Laws

Respectfully submitted,

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throughout the proceedings, as evidenced most recently by respondents' opposition to the petition for certiorari. The Idaho Governor may make any arguments he wishes as *amicus* in support of respondents in this case.